STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MIDWEST GENERATION, LLC v. COMMONWEALTH EDISON COMPANY Complaint as to unjust, unreasonable, and anti-competitive energy and capacity charge for station power, request for refunds, with interest, and other relief.	: : : : : : : : : : :	Docket No. 01-0562

COMMONWEALTH EDISON COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Commonwealth Edison Company ("ComEd") submits this Reply in support of its Motion for Summary Judgment requesting that the Illinois Commerce Commission (the "Commission") grant summary judgment and dismiss the Amended Complaint filed by Midwest Generation, LLC ("Midwest"), or alternatively, stay further proceedings pending arbitration.

I.

Introduction

ComEd seeks summary judgment based upon three facts established by the record in this case, which demonstrate that the Amended Complaint is wholly lacking in merit:

- The Memoranda of Understanding ("MOUs") between ComEd and Midwest are agreements for "contract service" as defined by the Illinois Public Utilities Act (the "Act"), 220 ILCS 5/1-101 et seq., and are not filed rates or tariffs.
- The MOUs expressly call for arbitration of all controversies arising under them, including controversies relating to their validity.
- Neither the Amended Complaint nor the MOUs provide any basis for overturning or reconsidering the ALJ's prior ruling dismissing the initial complaint with

respect to "monthly netting."[1]

In essence, Midwest's response to ComEd's Motion for Summary Judgment ("Motion") argues that the Motion is defective because it does not reach material issues of disputed fact in this case, principally whether Midwest was "forced" to buy station power from ComEd as a condition of its purchase of the fossil plants. This argument is without merit. ComEd strongly disputes the claim of duress, but the claim is not material to resolution of the Amended Complaint because it would be rendered moot by a ruling in ComEd's favor on the matters raised in the Motion. The only facts material to ComEd's Motion are the terms of the MOUs themselves and there is no dispute about those terms. Issues of the negotiation and formation of the MOUs, whether or not disputed, are immaterial to ComEd's Motion.

This Reply will show that ComEd is entitled to summary judgment regardless of Midwest's claim that ComEd took advantage of it in the plant sale deal. The Reply will show that:

- Because the MOUs are agreements for "contract service," their commercial terms are beyond the Commission's jurisdiction to review and alter, regardless of whether or not ComEd exerted economic pressure to secure them.
- Arbitration clauses that cover both the formation and implementation of contracts, like those in the MOUs, are enforceable and, indeed, favored under Illinois law. Such clauses cannot be avoided by a party's claim that the underlying contract was coerced or is otherwise invalid. Under Illinois law, such claims are for the arbitrator to decide.
- The dispute over negotiation of the MOUs is immaterial to the issue of "monthly netting." Even were the MOUs voided, there is no basis for concluding that remote self-supply calculated on a half-hourly or hourly basis would be unjust or unreasonable. The ALJ's prior determination as to this claim should be reaffirmed and made final.

[1] Although "netting" is the term used in Midwest's Amended Complaint, Midwest argues that that the term is inherently ambiguous. (Midwest's Response to ComEd's Motion for Summary Judgment ("Response") at 18). ComEd agrees that the term is ambiguous and suggests that Midwest frequently attempts to exploit this ambiguity. ComEd will use the more precise terms used by FERC: local self-supply, remote self-supply, and third-party supply.

For these reasons, ComEd is entitled to summary judgment regardless of the disputed factual issues Midwest raises.

Midwest also foregrounds a procedural argument challenging ComEd's right to bring the Motion. ComEd was required to bring a summary judgment motion putting the MOUs in evidence because Midwest failed, in both its initial and amended complaints, to attach the very contracts about which it complains. Midwest cannot avoid basic scrutiny of its complaint by first failing to plead the complete terms of the MOUs, and then claiming that a summary judgment motion that proves up those terms somehow "waives" basic legal arguments based on the very terms that the Motion was required to prove up. As shown below, that notion is taken from the pages of Kafka, not Illinois law.

II.

Applicable Legal Standards

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 102, 607 N.E.2d 1204, 1209 (1992). Midwest asserts that ComEd's Motion is defective because it "seeks to dismiss the Amended Complaint, rather than show that there are no genuine issues of fact." (Response at 5). ComEd's Motion plainly does both. It shows that there are no genuine issues of material fact concerning the terms of the MOUs -- the facts material to ComEd's Motion -- and that, as a result, ComEd is entitled to a judgment dismissing the Amended Complaint as a matter of law. ComEd's motion meets every applicable requirement for summary judgment. Midwest's contention that there is some procedural defect in the Motion is simply baseless.

Midwest also claims that because ComEd did not file a second motion to dismiss, but instead filed an answer and a summary judgment motion, ComEd waived any right to challenge

the "sufficiency" of Midwest's Amended Complaint. This claim is without foundation in law or fact, and should be rejected. The October 26, 2001 Administrative Law Judge's Ruling concludes that "the legal status of [the MOUs'] services under the Act [] cannot be discerned without examining the Agreements." (ALJ's Ruling at 3). Although Midwest could and should have attached the MOUs to its Amended Complaint[2], it failed to do so. Had it attached the MOUs, the ALJ would have been able to determine: (1) that they are agreements for contract service within the meaning of Section 16-102 and therefore not subject to the Commission's jurisdiction under the Act; and (2) that all disputes under the MOUs, including disputes over their underlying validity, must be submitted to arbitration. Because Midwest failed to attach the MOUs, the only way in which the threshold legal issues presented by the Amended Complaint can be resolved is through a motion for summary judgment, supported by authenticated copies of the MOUs. That is what ComEd has filed, and there is absolutely no defect in the Motion.

It is well settled that summary judgment is appropriate when the legal issues presented by a complaint can be decided by construing or applying the provisions of a contract. Village of Rosemont v. Lentin Lumber Co., 144 Ill. App. 3d 651, 659, 494 N.E. 2d 592, 596-97 (1st Dist. 1986); see also Gleicher, Friberg & Assocs. v. University of Health Sciences, The Chicago Medical Sch., 224 Ill. App. 3d 77, 84, 586 N.E. 2d 418, 423 (1st Dist. 1991) ("summary judgment is an appropriate procedure in construing the legal principles of a contract"); Srivastava v. Russell's Barbecue Inc., 168 Ill. App. 3d 726, 730, 523 N.E. 2d 30, 33 (1st Dist. 1988) ("[c]onstruing a contract is a matter of law suitable for summary judgment"). Those well-settled principles apply in this case. The questions presented by ComEd's Motion do not require

[2] See 735 ILCS 5/2-606 states that "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, ***must*** be attached to the pleading … or recited therein, unless the pleader attaches … an affidavit stating … that the instrument is not accessible [to him]." (emphasis added).

the resolution of any material issue of fact other than the authenticity of the MOUs. They merely require that the Commission examine the agreements and apply the law. That is precisely the function that a motion for summary judgment is designed to serve.

Midwest's contention that, by filing a motion for summary judgment, ComEd "waived" the right to raise jurisdictional questions is frivolous; it is elementary that questions of subject-matter jurisdiction cannot be waived. E.g., Levin v. A.R.D.C, 74 F.3d 763, 766 (7th Cir. 1996) ("Subject-matter jurisdiction cannot be waived and may be contested by a party or raised *sua sponte* at any point in the proceedings"); Fredman Bros. Furniture Co. v. Dept. of Revenue, 109 Ill. 2d 202, 215, 486 N.E. 2d 893, 898 (1985) ("lack of subject matter jurisdiction can be raised at any time, in any court, either directly or collaterally"). If the Commission properly finds that the MOUs are agreements for contract services, Midwest's complaint -- based on provisions of the Act that are inapplicable to contract services -- necessarily fails as well.

The one "waiver" case cited by Midwest dealt with an entirely different situation and provides no support for Midwest's claim that ComEd waived its right to file a summary judgment motion challenging the Commission's jurisdiction. In Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 55, 645 N.E. 2d 888, 889-91 (1994), the Court, "given the posture of the case…," merely applied the standard rule that defendant's failure to stand on its motion to dismiss and permitting the case to proceed to verdict cured "all formal and purely technical defects in the complaint…." ComEd is plainly not seeking judgment based on "formal and purely technical defects." Moreover, the court in Adcock denied defendant's motion entirely. Id. at 58. Thus the decision is inapposite here, where the motion to dismiss was denied, in part, because facts did not appear on the face of the Complaint.

For the same reason, Midwest errs in arguing that ComEd cannot in a motion for summary judgment rely on arguments initially presented in a motion to dismiss. The ALJ expressly found that he could not reach the issue of whether the MOUs were exempt from Commission review under the Act because Midwest had failed to present them as part of its claim. (ALJ's Ruling at 2). Thus, Midwest's assertion that "ComEd's new Motion is nothing more than an effort to relitigate the issues it lost in its failed Motion to Dismiss" (Response at 2) is unsupportable and should be rejected.

III.

ComEd's Motion for Summary Judgment Is Supported by the Act and the Undisputed Facts

A. The MOUs are Agreements for "Contract Service," Which the Act Expressly Places Outside the Jurisdiction of the Commission

ComEd's argument is simple, comprising only two parts. **First**, the Act plainly provides that agreements for contract service are outside of the Commission's jurisdiction under Articles IX and XVI. They are considered to be contracts like those entered into daily by businesses (including ComEd's competitors) and are not subject to the "just and reasonable" standard that applies to filed tariffs. Under the Act, the Commission may not "alter or add to the terms and conditions for the utility's competitive services [including contract service]." (Motion at 9). Midwest does not disagree. In addition, Midwest recognizes that "contract service" is a "competitive service" in accordance with Section 16-102 of the Act. (Response at 9).

Second, the MOUs are agreements for contract service. Though Midwest denies it, the ALJ need only look at the relevant provisions of the Act and the face of the contracts themselves to conclude that the MOUs are, in fact, for "contract service" and, therefore, fall outside the Commission's authority to review or alter their terms. Midwest's attempt to avoid this

conclusion is based on plainly erroneous readings of the Act and equally erroneous procedural arguments designed to avoid reaching this issue.

1. The MOUs are Agreements for Contract Service

ComEd's Motion established that:

- The MOUs attached to ComEd's Motion are true and accurate copies of the contracts that were entered into between the two parties.
- The MOUs are contracts between ComEd and Midwest.
- Under the MOUs, ComEd provides Midwest's generating stations with electric power and energy along with a variety of associated services, all on a bundled basis, with specifically negotiated demand and energy charges different from any in ComEd's filed tariffs.
- The MOUs were not filed with the Commission as rates.

Midwest does not dispute these essential facts. ComEd's Motion established that, given these facts, the contracts fall squarely within the definition of "contract service." In addition, Midwest does not dispute that, under the Act, competitive service agreements are outside the Commission's jurisdiction, nor that competitive services are expressly defined to include contract services. Instead, Midwest argues: (1) that the MOUs -- and, perforce, all bundled service contracts -- are actually "delivery services contracts" and thus excluded from the definition of contract service; and (2) that contract service agreements only lie outside of the Commission's jurisdiction where the customer can "shop" for the same service from others. Neither argument raises any factual issue and both are legally erroneous.

The MOUs Are Not "Delivery Services Contracts" Under The Act.

The MOUs, like all contracts for bundled service, are not delivery services contracts. They cover a bundled product only: electricity supplied to, and metered and billed at, the delivery point as a single, inseparable service. Midwest does not argue that it can purchase electric power and energy from third parties under the MOUs, nor that the MOUs allow it to take

delivery of power and energy on an unbundled basis. The word "solely" in the MOUs emphasizes that Midwest cannot take delivery services under the MOU while taking power and energy from someone else, or from ComEd under some other contract or arrangement. Even Midwest cannot seriously claim otherwise.

Midwest argues, however, that because provision of bundled service includes transportation of the electricity, any bundled service contract is a delivery services contract. Midwest's position is facially inconsistent with the Act. The key attribute of delivery services under the Act is that they are ***unbundled*** transportation services, offered by the utility on a separate basis so that the customer can take electric power and energy from another supplier. The Act's definition of delivery services, which Midwest carefully avoids quoting, expressly limits delivery services to the utility services necessary for the customer to secure delivery of electric power and energy from a third party. Section 16-102 defines delivery services as:

> those services provided by the electric utility that are necessary in order for the transmission and distribution systems to function so that retail customers located in the electric utility's service area <u>can receive electric power and energy from suppliers other than the electric utility</u>….

220 ILCS 5/16-102 (emphasis added). By statutory definition, the transportation component of bundled service provided by a utility does not constitute delivery services because it cannot be used to purchase electric power and energy from suppliers other than the utility (or, for that matter, from the utility under separate tariffs or agreements).

> <u>The Commission's IDC Ruling Shows That Utilities Can Offer Station Power As A Bundled Contract Service.</u>

Midwest's position is equally inconsistent with the Commission's ruling in the Integrated Distribution Company ("IDC") rulemaking, where the Commission directly addressed the question of contracts between utilities and Independent Power Producers ("IPPs") for bundled

station power service. Rulemaking proceeding to implement Section 16-119A(a) of the Public Utilities Act regarding standards of conduct, Docket Nos. 98-0147/98-0148 (consol.) (Order, February 15, 2001("Order")) at 25; (Second Notice Order, October 26, 2001) at 2. The Commission, over ComEd's objection on policy grounds, found that IDC utilities should not be permitted to continue to enter into competitive station power contracts with IPPs -- like those at issue here. Order at 25. This Commission precedent is directly contrary to Midwest's position. If Midwest were correct that all bundled contracts for station power must be treated as filed rates, the issue decided by the Commission would have been moot. Whether or not a utility was an IDC, it would have been allowed to offer station power services only on a filed, special contract basis, subject to full Commission review under Article IX. The Commission's ruling thus necessarily recognizes that, absent a utility's IDC status, the utility can enter into bundled service contracts for the provision of station power to an IPP on a competitive basis under the Act. Order at 25-26.

Midwest Could Not Take Services For Which It Was Not Legally Eligible.

The flaw in Midwest's analysis is also revealed by Midwest's own argument that, at the time the MOUs first became effective (December 15, 1999), some of Midwest's generating units were not eligible to take delivery services. (Response at 15-16). Midwest asserts that several of its generating units were not eligible to take delivery services prior to December 31, 2000, over a full year later. (Response at 15-16). Midwest's recognition that it was ineligible for open access as to some units necessarily means that Midwest was ineligible to receive delivery services for those units. It is simply not possible that the MOUs are contracts for delivery services, as Midwest argues, since Midwest, by its own admission, was not legally eligible to take delivery

services. [3]

Midwest's Other Arguments That The MOUs Are Delivery Services Contracts Are Without Merit.

Midwest also asserts that references in the MOUs to prices stated in Rate RCDS mean that the MOUs are delivery services contracts. Midwest errs. The MOUs refer to transmission and distribution charges from ComEd's tariffs as a means to aid the calculation of the bundled contract price. Midwest is not free under the MOUs to purchase delivery services at those prices, and Midwest does not claim that it is. The fact that a bundled service price is achieved by assembling prices of components does not mean that the service itself is unbundled. [4]

Finally, Midwest attempts to characterize ComEd's argument that bundled service and delivery services are distinct as creating an unstated exception to the definition of delivery services. Nothing could be further from the truth. Since the very beginning of restructuring, it has been clear that delivery services and bundled services are distinct. That distinction is reflected in the language of the Act and numerous Commission orders. Bundled service is simply not a delivery service. No "exception" or "end run" is involved.

In short, Midwest's argument that ComEd cannot enter into competitive delivery services contracts until the Commission declares delivery services competitive pursuant to Section 16-113 of the Act simply misses the point. ComEd never argued that it could. The MOUs are not delivery services contracts. While Midwest is quite unhappy about it, a central feature of the

[3] Midwest argues that because it was not eligible to take delivery services, the relevant MOUs are not "competitive". In addition to Midwest's legal error about the meaning of competitive service under the Act, addressed below, this is factually erroneous. Midwest had competitive alternatives, including local self-supply.

[4] The distinction between referring to component prices as part of an offering of a single bundled service and separately offering unbundled services is illustrated by Section 109A of the Act, which states that the Commission may order unbundling of the prices of tariffed services other than delivery services, separately and distinctly from the unbundling of those services. 220 ILCS 5/16-109A.

1997 amendments to the Act was to permit utilities to negotiate with customers to enter into bundled service contracts without traditional Commission regulation of the agreed terms.

Midwest Seeks To Import Into The Act A New Definition Of "Competitive Service."

The Act imposes no requirement that contract service can only exist where competitors can offer the same service. Although the Act unequivocally states that "contract service" is a "competitive service," Midwest now claims that under common sense, a service cannot be "competitive" unless other suppliers are offering it. This argument is facially inconsistent with the Act. The Act defines "competitive service" as ***either*** services that the Commission has expressly declared to be competitive under Section 16-113 after a finding that competitors in fact exist for the same service, ***or*** contract service, for which there is no requirement that it be offered by others. The Commission should reject Midwest's attempts to create new requirements not found in the Act.

Midwest's theory that a utility is not permitted to enter into a contract for bundled service until delivery services are declared "competitive services" by the Commission is contrary not only to the Act, but also to historical practice. Utilities have contracted with commercial and industrial customers for bundled service for years. The Commission has never asserted or held that these contracts are delivery services contracts. Moreover, the Commission has often observed that since the passage of the Act, other utilities have entered into numerous bundled service contracts for large customers. Under Midwest's theory, all of these contracts would have been delivery services contracts as well.

2. Prefatory Language Does Not Confer Rights

Midwest asks that the Commission create a substantive right of action based upon the prefatory language in Article XVI of the Act that discusses the goal of fostering an efficient competitive environment. This argument suffers from two independent flaws. First, it runs

directly afoul of the substantive provisions of the Act. As shown above, the MOUs are agreements for contract service outside of the Commission's jurisdiction. There is no special exception in the statute for complaints making assertions that contracts are "anti-competitive."

Second, Midwest is simply incorrect that the preambles to the Act create substantive rights that a contract can "violate" or that they create independent grounds for a complaint. ComEd's Motion demonstrated that prefatory language does not grant parties additional rights beyond those conferred by the substantive portions of the statute. Midwest does not address the cases cited by ComEd, but instead claims that a "more recent and more pertinent" decision holds otherwise. In fact, PrimeCo Personal Communications v. Illinois Commerce Commission, 196 Ill. 2d 70, 750 N.E. 2d 202 (2001), on which Midwest relies exclusively, does not stand for the proposition that the preambles create rights of action. Rather, PrimeCo holds that prefatory language may be helpful in ascertaining the legislative intent of a statute. ComEd has never disputed that proposition, which has no relevance at all to ComEd's Motion. Neither ComEd's Motion nor the cases cited by ComEd conflict with the PrimeCo decision in any way.

3. Midwest Misapplies the Standard on Summary Judgment:

Finally, Midwest argues that purported "genuine issues of fact" exist and "ComEd's Motion does nothing to resolve these factual issues." (Response at 7). But Midwest does not demonstrate that any of the factual issues it raises are material to the Commission's determination whether, as a matter of law, the MOUs are agreements for contract service.

Midwest has made no such showing because it cannot. The few facts on which ComEd's Motion turns are not in dispute. The services covered by the MOUs are described in the agreements. Midwest does not contest them. The only question is whether the services described therein are contract service within the meaning of Section 16-102. As ComEd

properly set forth in its Motion, summary judgment should be granted when the evidence raises no genuine issue as to any *material* fact and the movant is entitled to judgment as a matter of law. (Motion at 4, emphasis added); see also Outboard Marine Corp., 154 Ill. 2d at 102; Jacobson v. Board of Educ. of the City of Chicago, 321 Ill. App. 3d 103, 108, 746 N.E. 2d 894, 898 (1st Dist.), appeal denied, 195 Ill. 2d 579, 755 N.E. 2d 477 (2001); Village of Rosemont, 144 Ill. App. 3d at 659. Because there is no genuine issue of material fact and ComEd is entitled to judgment as a matter of law, ComEd's Motion should be granted.

B. The MOUs Require That Midwest's Dispute Be Arbitrated

As noted in ComEd's Motion, the MOUs provide that:

> 4. Disagreements.
>
> (a) Administrative Committee Procedure. This Section 4 shall provide the exclusive means of resolving any dispute, claim, controversy or failure to agree arising out of, relating to, or connected with this MOU or the breach, interpretation, termination or validity thereof ("Dispute")….
>
> (b) Arbitration. If pursuant to Section 4(a), the Parties are unable to resolve a Dispute within 30 days after written notice of the existence of a Dispute, such Dispute shall be settled by final and binding arbitration in Chicago, Illinois. The arbitration shall be governed by the United States Arbitration Act (9 U.S.C. §1 et seq.), and any award issued pursuant to such arbitration may be enforced in any court of competent jurisdiction. This agreement to arbitrate and any other agreement or consent to arbitrate entered into in accordance herewith will be specifically enforceable under the prevailing arbitration law of any court having jurisdiction….

(MOUs § 4). Midwest does not deny that this plain language applies to its claims or that its claims require arbitration. Instead, Midwest repeats its argument that the MOUs are rates subject to plenary Commission review and, with little discussion or support, invites the Commission to conclude that an arbitration clause would be unjust or unreasonable. (Response at 17).

Midwest's argument fails for two independent reasons. First, as shown above, the MOUs are agreements for contract service. Their negotiated terms may not be altered by the Commission. Therefore, the arbitration agreement must be honored.

Second, even if the MOUs were subject to plenary Commission jurisdiction, the arbitration clauses should still be honored. The Illinois Uniform Arbitration Act, 710 ILCS § 5/1, et seq., establishes a "liberal" policy favoring arbitration. It "embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes." Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr, 124 Ill. 2d 435, 443, 530 N.E. 2d 439, 442-43 (1988). Illinois courts favor arbitration as a fast, effective and less burdensome means of dispute resolution. United Cable Television Corp. v. Northwest Ill. Cable Corp., 128 Ill. 2d 301, 306, 538 N.E. 2d 547, 549-50 (1989); Johnson v. Baumgardt, 216 Ill. App. 3d 550, 555-56, 576 N.E. 2d 515, 518 (2d Dist. 1991).

Midwest seeks to avoid this policy and its own agreement to arbitrate disputes with ComEd by arguing that parties may never "substitute" arbitration for adjudication by an administrative body, such as the Commission. There simply is no such rule of law. Midwest fails to specify any statutory provision with which an arbitrator's ruling in this cause would conflict. Section 9-102.1(h), cited by Midwest to support Commission jurisdiction generally, simply does not preclude alternative dispute resolution in agreements such as this, even were they not for contact service. Not only does the arbitration clause at issue here do nothing to impair the right to seek review of a filed rate schedule (which even Midwest does not claim the MOUs are), it specifically states that "[n]othing contained in this Section shall be construed as affecting the right of any customer or public utility to enter into and enforce any contract" *even where it was required to be -- and was -- filed.* Section 9-102.1(h) is hardly a mandate to flatly

ignore plain terms of contracts.

Indeed, while there is no Illinois case directly on point, the U.S. Supreme Court did address the enforceability of arbitration clauses where a claim was made that to do so required that the complainant not pursue his underlying statutory right to adjudication in another forum. In Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 26 (1991), the Court reiterated that "'[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" Id. at 26. Contrary to Midwest's protest, the Supreme Court in Gilmer recognized that arbitration of a statutory claim is not equal to giving up any right under a statute. It is simply another forum in which to resolve the dispute. Id. at 26.

As noted above, Illinois law mirrors federal law in favoring arbitration of disputes. There is simply no statutory basis in the Public Utilities Act for refusing to follow the Illinois Arbitration Act. Indeed, a recent addition to the Public Utilities Act demonstrates the General Assembly's intention to promote the arbitration of statutory claims that would otherwise be addressable through Commission oversight. Section 10-101.1(a) states that:

> [i]t is the intent of the General Assembly that proceedings before the Commission shall be concluded as expeditiously as is possible consistent with the right of the parties to the due process of law and protection of the public interest. It is further the intent of the General Assembly to permit and encourage voluntary mediation and voluntary binding arbitration of disputes arising under this Act.

220 ILCS § 5/10-101.1(a). Thus, not only is Midwest's assumption about the Act's attitude toward arbitration incorrect, the Act expresses the clear intention of the General Assembly that agreements to submit claims under the Act to binding arbitration shall be "permit[ted] and enourage[d]…." Accordingly, even were the MOUs not agreements for contract service, the existence of Commission jurisdiction cannot serve as a basis to deny ComEd's motion. For this

independent reason, the Motion should be granted.

C. Midwest's Request That the Commission Order Monthly "Netting" Must be Rejected

ComEd's Motion established that the Amended Complaint failed to cure the defect found by the ALJ in the initial complaint with regard to Midwest's "monthly netting" claim. The ALJ ruled that: (1) Midwest had failed to state whether netting is occurring now and if so, how it differs from the netting Midwest seeks; and (2), more importantly, Midwest had failed to allege, much less offer facts to establish, that any present netting practice is unjust and unreasonable. (ALJ's Ruling at 8). The Amended Complaint alleged that no netting was currently being allowed under the MOUs, which is false, as ComEd's Motion demonstrated from the face of the agreements. In addition, the Amended Complaint, as ComEd pointed out, failed to make any showing that the Commission should order *monthly* netting, as opposed to netting based on some other interval. For these reasons, the ALJ's Ruling dismissing this portion of the initial complaint should be affirmed and made final as to the Amended Complaint.

Midwest's brief response to the Motion on this point is wholly inadequate and never even mentions the issue of *monthly* netting at all, which is all that is at issue. Midwest now admits that the MOUs permit netting, but argues that they do not permit netting under all the circumstances that Midwest would prefer – none of which involves a monthly netting interval. As shown in ComEd's Motion, the terms agreed to by the parties permit netting in the form of local self-supply (*i.e.*, supply of station power needs from electricity produced by a generating facility "behind the meter") based on a one-half hour interval. Midwest now acknowledges that

local self-supply is, in fact, permitted under the MOUs.[5] (Response at 18). As the Amended Complaint, properly construed, alleges, the MOUs do not permit remote self-supply with net electricity use measured on a monthly basis. Midwest's Response, however, does not even attempt to establish that such a "netting" regime must -- or even should -- be allowed. As a legal matter, Midwest's Response does nothing to satisfy its burden to show that it is unjust or unreasonable to measure net electricity use on other than a monthly basis. Nor does Midwest acknowledge FERC's clear ruling that hourly measurement can be appropriate. Rumford Power Assocs., L.P., 97 FERC ¶ 61,173 (2001). Moreover, ComEd's Motion and the accompanying affidavit of David Geraghty exhaustively explained why monthly measurement of net electricity flow is impractical, and is unjust and unfair both to ComEd and to other IPPs in ComEd's service territory. (Motion at 14-19; Geraghty Affidavit). In fact, ComEd showed that Midwest's proposal would result in discriminatory and preferential pricing in that Midwest would not be paying for its share of ComEd's transmission and distribution facilities that Midwest uses, when other customers must do so. [6]

Midwest simply ignores these facts. The facts established by ComEd show that any net electricity use should not be measured or "netted" on a monthly basis, and are unrebutted by Midwest in either its Response or the affidavits of Midwest witnesses Long and Nelson. Further,

[5] Midwest's Response appears internally inconsistent. Midwest alleges that it "is entitled to net or remotely self-supply its station service, from the power that its own generating stations produce. ComEd, however, will not allow Midwest to do so." (Response at 18). Yet, Midwest also states that "ComEd is dictating how netting should occur…." (Response at 19). And, Midwest makes the statement quoted that some "netting" is allowed. The MOUs, however, are clear: local self-supply is permitted and station energy output is effectively netted against station energy use.

[6] Through discovery, Midwest received and has had the opportunity to review the electric service contracts of all IPPs within ComEd's service territory. Significantly, Midwest has not claimed that Midwest is subject to different charges than any other IPP. There is simply nothing to support Midwest's assertion that netting on half-hourly intervals, as provided under the MOUs, is discriminatory, unjust or unreasonable.

even assuming that Midwest had demonstrated that monthly netting is reasonable (which it has not), such a finding would not establish that netting over a shorter interval was unreasonable. Midwest has simply failed to address the only question relevant to this portion of its Amended Complaint -- the reasonableness of the half-hour interval over which self-supply is allowed under the MOUs. With respect to Midwest's netting argument, nothing has changed. Neither the Amended Complaint nor Midwest's Response to ComEd's Motion provides any basis for overturning or reconsidering the ALJ's prior ruling dismissing this portion of the complaint.

IV.

CONCLUSION

For the foregoing reasons, and the reasons stated in ComEd's Motion, summary judgment should be granted and the Amended Complaint dismissed.

Dated: January 25, 2002

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

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CERTIFICATE OF SERVICE

I, E. Glenn Rippie, do hereby certify that a copy of the foregoing Reply of Commonwealth Edison Company's Reply in Support of its Motion for Summary Judgment was served upon all parties on the attached Service List by the method so indicated this 25th day of January 2002.

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